RE LAU KAH LAY & TANG KUONG TIEW; EX P COLD STORAGE (MALAYSIA) BHD

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[BANKRUPTCY NO: 549-1986]
21 JUNE 2001

BANKRUPTCY: *Discharge - Application - Whether application should be allowed in view of suspicion that assets of bankrupts were transferred to wives - Whether duty upon Official Assignee to investigate under s. 31 of Bankruptcy Act 1967 - Whether bankrupts to procure affidavits from wives with supporting evidence to explain away suspicion*

BANKRUPTCY: *Official Assignee - Duty of Official Assignee to investigate wife of bankrupt - Bankruptcy Act 1967, s. 31*

This was an appeal by two bankrupts against the refusal of the deputy registrar to have them discharged as bankrupts under s. 33 of the Bankruptcy Act 1967 ('the Act'). This was their second application to have themselves discharged after their first application was dismissed by the court wherein the Official Assignee ('OA') was directed to make a further investigation and to give a further report. In this instance, the report of the OA stated that they were powerless to investigate the wives of the bankrupts.

Held:

[1] The primary duty to investigate the wives of the bankrupts lies upon the OA and the law in this regard is s. 31 of the Act. The OA carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away whether in his name or in the name of his wife or children as otherwise people will be imbued with the message that money borrowed can be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt.

[2] At the very least the OA should have followed the trails of the involvement of the wives of the bankrupts in the supermarket business where their bankrupt husbands were without question the directing mind and body. The wives should be questioned as to where they got the money to involve in that business and to show proof of it; and the accounts of those companies that they were involved in should be examined by an expert to unearth the trails of the money. Also, the office of the OA must not simply accept statements from the wives that they received the money from their relatives without going further and establishing that the money did come from their relatives.

[3] Apart from the wives, the OA could have applied under s. 31 of the Act to summon and examine others who would be able to shed light into the investigations. None of the reports prepared by the OA had covered those grounds.

[4] The alternative step open to the bankrupts would be to procure affidavits from their wives and those concerned that the investment in the supermarket business and others did not come from any assets of the bankrupts. For that purpose, they would have to provide statements of accounts to that effect. Unless the matters giving rise to suspicion that the assets of the bankrupts might have found their way to their wives were reasonably explained away (with supporting evidence), the court was not disposed to discharge the bankrupts even with conditions.

[Appeal dismissed.]

Case(s) referred to:
Seloga Jaya Sdn Bhd v. Pembenaan Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 31(1), 33

Other source(s) referred to:
William & Muir Hunter on Bankruptcy, 19th edn, p 113

For the bankrupts - Frank Tang; M/s Tang & Partners
For the creditors - Michael Bexter; M/s Ee & Lim Advoc, Chong Chieng Jen; M/s Chong Brothers Advoc, George Chapman; M/s Lim Tan & Partners, Fabian Sigar; M/s John Shek & Co, Doris Chong; M/s Battenberg & Talma, Yong Sie Mee; M/s Goh & Partners
For the Inland Revenue - Simon Tan
For the Offical Assignee - Kho Fui Long

Reported by Usha Thiagarajah

JUDGMENT

Ian HC Chin J:

This is an appeal by two bankrupts Lau Kah Lay and Tang Kuong Tiew against the refusal of the Deputy Registrar to have them discharged as bankrupts under s. 33 of the Bankruptcy Act 1967. The proper manner in which to consider this appeal is stated in *Seloga Jaya Sdn Bhd v. Pembenaan Ting (Sabah) Sdn Bhd* [1994] 2 AMR 24 to be:

Held 1(a) – A judge in chambers who hears an appeal from a discretionary order of the Registrar, exercises his own discretion as if the matter comes before him for the first time, unfettered by the previous exercise of the Registrar's decision. The Judge will give the Registrar's decision whatever weight it deserves.

This is the second time that the bankrupts had applied for a discharge, the first having been dismissed by me on 21 February 1998 and in which judgment I directed the Official Assignee to make further investigation and to give a further report. That report has been given but the Official Assignee in the report stated that they are powerless to investigate the wives of the bankrupts. The law in this regard is s. 31 of the Act, *viz.*:

S. 31 Discovery of debtor's property

(1) The court may, on the application of the Official Assignee or of any creditor who has proved his debt at any time after a receiving order had been made against a debtor, summon before it the debtor, or any wife of his, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the court deems capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.

(2) If any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of its sitting and allowed by it, the court may by warrant cause him to be apprehended and brought before it concerning the debtor, his dealings or property.

(3) The court may examine on oath, either by word of mouth or by the written interrogatories, any person so brought before it concerning the debtor, his dealings or property.

(4) If on the examination of any such person it appears to the court that he is indebted to the debtor, the court may, on the application of the Official Assignee, order him to pay to the Official Assignee, at such time and in such manner as to the court seems expedient, the amount in which he is indebted or any part thereof, either in full discharge of the whole amount in question or not as the court thinks fit, with or without costs of the examination.

(5) If on the examination of any such person it appears to the court that he has in his possession any property belonging to the debtor the court, on the application of the Official Assignee, order him to deliver to the Official Assignee such property or any part thereof at such time and in such manner and on such terms as to the court seems just.

(6) The powers given to the court under this section may in all cases be exercised by the Registrar and any order made or act done by the Registrar shall be deemed the order of act of the court.

The Official Assignee also took the position that it is up to the creditors to do their investigation but the primary duty is upon the Official Assignee. The Official Assignee cannot take the same attitude of the creditors because that office serves a greater interest than the self-interest of the creditors. It is understandable why creditors cannot afford to take further steps that involve costs to them as they are already saddled with a debt they have yet to recover and therefore it is unreasonable to expect them to expend money to do the things which the Official Assignee is authorised to do under the Bankruptcy Act 1967. The Official Assignee carries the onerous task of ensuring that a bankrupt has no hidden assets stashed away whether in his name or in the name of his wife or children as otherwise people will be imbued with the message that money borrowed can be stashed away and need not be repaid and such horde can be enjoyed even when one is a bankrupt. If the office of the Official Assignee does not show itself equal to the task of preventing such rip-off of the creditor, then cases of borrowers not repaying and not minding to be made bankrupt will be the rule rather than the exception. Then the business morality will decline.

The office of the Official Assignee despite my order has said that they have no power to investigate the wife. Surely, that office is aware of s. 31(1) of the Act. There are plenty of reasons to suspect that the wife of the bankrupt may be in possession of the property of the bankrupt and that she would at least have the relevant information. I have referred to some of them in my earlier decision, like the transfer of the land purportedly for valuable consideration within two years of the bankruptcy. Subsequent to the judgment the transfer was called into question and the wife had to pay a further sum which the creditors accepted to save the transfer. Some of the relevant facts which should arouse the suspicion of the Official Assignee have already been stated in my said judgment but all of the facts are available from the Notes of Proceedings of the examination of the two bankrupts conducted on 16 January 1998. The following facts emerged from the examination:

(1) The wife of the bankrupt Law Kah Lay (and she is also the sister of the other bankrupt Tang Kuong Tiew) had prior to her marriage to the bankrupt worked as a shop assistant in a supermarket for a salary of between RM200 to RM300;

(2) About a year after her husband became a bankrupt she became a shareholder in a holding company ("Kasada") which owns a chain of supermarkets but hitherto she was never a director of any supermarket company;

(3) The bankrupt was before his bankruptcy also involved in a chain of supermarkets and the debts he owed came as a result of his being a guarantor of those supermarkets;

(4) The wife claimed the money which enabled her to invest in the holding company came from her father;

(5) The bankrupt worked for a company ("Kanion") owned by a Liew Jin Nee who was a fellow director of his in a company and is also a fellow director of the wife in the holding company Kasada and the wife of the other bankrupt is also a director of Kasada;

(6) The bankrupt alleged that he was after his bankruptcy sent by Kanion on business trips to Thailand, Singapore, Hong Kong, Australia, Canada and other South East Asian Countries and he was allowed by the office of the Official Assignee to do so after making various payments;

(7) The bankrupt's daughter was educated overseas after he was made a bankrupt and this was alleged to have been financed by relatives;

From those facts, it is obvious that the triumvirate of the two bankrupts and Liew Jin Nee are replaced by that of Liew Jin Nee and the two wives of the bankrupts. It is obvious that where the previous had left off the new trio has continued in the business of the supermarkets with the bankrupts actively involved and so much better off even though with a debt, at one stage, of about RM13 millions, since they have no traceable assets to meet the debt but yet live a life of luxury, like overseas trips. Then there is the question of why the wives should dive into the supermarket business when their husbands have failed. As for those trips it is hard to accept that they are for business since Kanion which is involved in purchasing goods need not venture out as the supplier would be queuing up at their door to sell their wares. All the matters I mentioned give rise to a suspicion, and very highly at that, the possibility exists that the assets of the bankrupts may have found their way to their wives to continue the supermarket business where the bankrupts have left off leaving huge unpaid debts but the bankrupts none the worse for it.

At the very least the Official Assignee should follow the trails of the involvement of the wives of the bankrupts in the supermarket business where their bankrupt husbands are without question the directing mind and body.

(1) The wives should be questioned as to where they get the money and to show proof of it; and

(2) The accounts of those companies involved should be examined by an expert to unearth the trails of the money;

For the purposes, the office of the Official Assignee must not simply accept statements like, for example of the wives, "I got the money from my relatives" without going further and establishing that the money really come from the relatives. The amount of money involved would not be small since Kasada owned a chain of supermarkets known as Supermart, Grand and Big Fresh where the bankrupts' wives are now involved as shareholders and directors. It must also not be forgotten that apart from the wives, the other director would be able to shed light. The Official Assignee should have applied under s. 31 for these people to be summoned and examined. None of the reports prepared by the Official Assignee had covered those grounds. As for the scope and purpose of s. 31, this is what *William & Muir Hunter on Bankruptcy*, 19th edn., p. 113, has to say:

> The powers contained in this section are primarily directed to enabling the court to help a trustee in bankruptcy to discover the truth of the circumstances relating to the bankrupt's property, dealings and affairs, with as little expense and as much expedition as possible, and with a particular view to the recovery of assets and ascertainment of the validity of creditors' claim.
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> The trustee if dissatisfied with the information given to him by the bankrupt, is entitled to summon the bankrupt for examination, and need not show that the bankrupt has made default in providing information, and the same power is conferred by the section with respect to the bankrupt's wife (or, it is presumed, her husband). The power to examine the bankrupt continues after his discharge, and may extend, after his death, to his personal representatives. In the case of witnesses other than the bankrupt (or his wife or her husband), the trustee may be called upon to show that some enquiry has already made of the witnesses, eg, by letter, without satisfactory result.

The alternative step open to the bankrupts if the Official Assignee does not bother would be to procure affidavits from their wives and the said director and relatives to show that the investment in Kasada and the financing of the education of the daughter did not come from any asset

which the bankrupts may have. For this purpose they will have to provide statements of accounts which show where the fund of the wives had come from as to enable them to invest in Kasada. Unless I have that or unless I have a report of the Official Assignee that those matters giving rise to the suspicion that assets of the bankrupt may have found their way to the wives are reasonably explained away (with supporting evidence) I am not disposed to discharging the bankrupts even with conditions. I am also of the view that the Deputy Registrar had for the reasons stated in his judgment, which I do not propose to set out, correctly exercise his discretion in refusing the application to discharge the bankrupts.

The appeal is therefore dismissed with costs to the respondent creditors.